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In the

Supreme Court of the United States

EMC CORPORATION,

Petitioner,

versus

JOAN H. BRAITSCH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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I

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is not reported, but the judgment is noted at 210 F.3d 360 (4th Cir. 2000) (Table). The orders of the United States District Court for the Eastern District of Virginia denying EMC's request for an award of attorney's fees (App. 3a-6a, 10a-11a, 16a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2000. A timely petition for rehearing and rehearing en banc was denied on May 2, 2000 (App. 49a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATEMENT OF THE CASE

I. Background

EMC specializes in manufacturing and selling computer equipment. Although EMC struggled during the late 1980's, since then it has become very prosperous to the point of reaching $1.2 billion in sales by 1994 and directly competing with IBM. Prior to 1990, EMC had marketed its products around the country through a network of sales offices and representatives. In 1995, EMC opened a District Office which targeted all the agencies and offices of the federal government located across the country, in addition to its regional offices.

From March 1990 through January 3, 1992, EMC employed Joan Braitsch to sell computer equipment to the federal government and related customers. When Mrs.

Braitsch was initially hired, she was orally offered a base salary of $40,000, but the written employment contract that EMC later produced provided a $35,000 base salary. Thus, her supervisor promised to correct the "paperwork" error so that her base salary would be increased to reflect the appropriate amount. EMC never corrected the error despite Mrs. Braitsch's attempts to follow up on the issue. After initial training in 1990, Ms. Braitsch began selling certain EMC products. However, it turned out that the products she had been hired to sell were being discontinued by EMC and thus there was insufficient existing business to generate $40,000 worth of commissions. Even though it was impossible for Mrs. Braitsch to meet her quota because the product lines she sold were being discontinued, she stayed with the company as a result of EMC 's offer to extend her draw and its assurances that there was no need to meet her quota. Mrs. Braitsch also decided to continue with EMC since it was about to start producing a new product line, the Symmetrix, which had the potential of generating large sales and commissions.

Notwithstanding the disappearance of the products she was assigned to sell and EMC's failure to correct the error in her pay, Mrs. Braitsch did well in 1990. During the last six months of 1990 she accumulated sales bookings in an amount in excess of $981,395. This figure included a $400,000 booking with the Drug Enforcement Agency ("DEA") for a Symmetrix which was ultimately never consummated due to a preexisting Department of Justice ("DOJ") contract with another vendor. However, Mrs. Braitsch was entitled to credit for the booking since, in 1990, EMC's compensation plan set quotas in terms of booking, not revenue. As a result of achieving her quota, for the second half of 1990 by such a wide margin, Mrs. Braitsch was eligible for the EMC 101 Club which provided special recognition for the most successful sales

representatives. However, EMC failed to credit Mrs. Braitsch for all of her bookings.

Moreover, in addition to constantly changing Ms. Braitsch's territory, EMC allowed other sales representatives to sell in her territory despite a company policy against such "poaching." Thus, Mrs. Braitsch was often forced to share her commissions for sales in her own territory with other employees in the company who had not had any involvement in the sale. The men in her division, however, were not required to split their commissions. As a result of the non-refundable draw in 1990, however, this loss of commission did not affect her compensation. But, by denying her credit for sales, EMC was able to later say that she had failed to meet her quota. In 1990, however, she had been told that as a result of the discontinued product line she was not expected to meet her quota. Moreover, in the end of 1990, she was told that she "was doing a very good job," was being promoted to a different department, and would receive a higher base salary.

Just before Mrs. Braitsch was hired, EMC had hired Mr. Monkelien for $35,000 salary, with promises of $45,000 in a few months. This promise to the male salesman was $5,000 more than Mrs. Braitsch's promised increase. But Mr. Monkelien was not similarly situated with Mrs. Braitsch because things did not go as well for him.[1] In 1990, his sales only totaled $275,000. In addition, he was informed at the end of 1990, that his performance and professionalism were unsatisfactory and in accordance with company policy was being placed on a performance

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[1]The district court's finding that Mr. Monkelien and Mrs. Braitsch were similarly situated was not something that Mrs. Braitsch could necessarily have foreseen since Mr. Monkelien had less experience than Mrs. Braitsch and was cited for unprofessional behavior in 1990. Mrs. Braitsch's bookings were more than three times those of Mr. Monkelien and she was promoted at the end of 1990.

improvement plan. In April 1991, he was fired after failing to improve during his performance improvement period.

After an extension, both Mr. Monkelien's and Mrs. Braitsch's entitlement to a draw were scheduled to stop at the end of 1990. Mrs. Braitsch's draw was discontinued, while Mr. Monkelien was continued on a $2,000 per month draw in 1991 lasting until his termination.

II. Mrs. Braitsch's Claim that in 1991 EMC Paid Mrs. Braitsch Significantly less than Her Male Counterparts.

In 1991, Thomas Aaron became the District Director. Mr. Aaron hired several new salesmen, James Newgaard, William Hoover, and Lawrence Seder, all of whom were paid more than Mrs. Braitsch. Accordingly, during 1991, the sales staff for the Federal District received the following monthly compensation:

	Braitsch	Newgaard	Seder
Base Pay	$2,916.67	$3,333.33	$2,916.67
Draw	$0.00	$3,500.00	$3,000.00
Car Allowance	$325.00	$360.00	$360.00
Total	$3,241.67	$7,193.33	$6,276.67
Comparison to Braitsch		**221.90%**	**193.62%**

	Monkelien	Hoover
Base Pay	$2,916.67	$3,333.33
Draw	$2,000.00	$3,000.00
Car Allowance	$325.00	$360.00
Total	$5,241.67	$6,693.33
Comparison to Braitsch	**161.70%**	**206.48%**

III. Mrs. Braitsch's Claim that EMC Retaliated Against Her When She Complained about Discrimination.

By June 1991, Mrs. Braitsch became aware that she was being compensated less than the men and asked EMC, via her supervisor Mr. Aaron, to rectify the situation. Mr. Aaron promised her that the situation would be addressed, but no corrective action was taken. Several months later, she followed up with a letter to Mr. Aaron dated September 24, 1991. On October 14, 1991, she again followed up in writing as well as on November 4, 1991 without ever receiving a response. In November 1991, her territory was reduced. Consequently, she sent a memo to her superiors on November 3, 1991, expressing her views that the territory reduction was unfair.

Prior to November 10, 1991, Mrs. Braitsch had never been informed that her performance was unsatisfactory. However, by a memorandum dated November 11, 1991, Mr. Aaron accused her of unsatisfactory performance and unprofessional conduct. The allegations of unsatisfactory performance and conduct

were purportedly based on the fact that she had not met her revenue quota and seven other allegations. As reflected below, Mrs. Braitsch had good reasons for believing that each of these allegations was false:

A. Expense Reports:

The allegation referred to reimbursement of Mrs. Braitsch for money that she expended in the course of her duties. Failure to submit reports on time meant only that she would not be reimbursed which, in turn, meant that EMC could retain money which was due to her. After being reminded in March 1991, Mrs. Braitsch submitted her expense vouchers within the specified time and she never received a subsequent reminder. Accordingly, there was no basis for the allegation in November 1991 of a lack of professionalism based on late expense reports.

B. Knowledge of USIA and Air Force Logistics Command:

Mrs. Braitsch was very much on top of both the USIA and Air Force Logistics Command contracts. In fact, the testimony of the USIA employee and Computer Specialist Richard Genders confirms that it was Mrs. Braitsch and not the commercial representative who was primarily responsible for sales to USIA. In this case, the commercial representative was allowed to "poach" in Mrs. Braitsch's territory and was given part of her commission in direct violation of company policy. Regarding the contract with the Air Force Logistics Command, Mrs. Braitsch worked with the local representative as provided by EMC policy to negotiate a sale with this customer. Therefore, EMC had no valid basis to criticize Mrs. Braitsch with regard to either contract.

C. Handling of DOJ/DEA Opportunity:

Mrs. Braitsch effectively marketed EMC's product to the appropriate person at DEA. Accordingly, there was no basis for a claim that Mrs. Braitsch was insensitive to the situation involving the DEA. This fact again shows that her supervisor criticized her without any basis in fact. Ultimately, top level people at the DOJ would not approve a sale due to a preexisting contract. However, she maintained a good rapport with DEA which could have been useful for future opportunities. Moreover, as with the other criticisms, this issue was never mentioned to Mrs. Braitsch until November 11, 1991 -- *after* she had pressed her complaints that she was being compensated less than her male counterparts.

D. Langley Air Force Base:

Another situation arose when Mrs. Braitsch was working with a local EMC representative who served Langley Air Force Base. Ordinarily, when a federal agency issued a Request for Proposal ("RFP"), EMC was required to submit a written proposal. It would be Mrs. Braitsch's function to prepare the proposal and submit it through the local representative. There are thousands of government offices which could be potential customers and Mrs. Braitsch had no means of keeping up with RFP's around the country. Therefore, it was the job of the local representative to identify the RFP. In this case, the local representative failed to inform Mrs. Braitsch about the Langley RFP. There was no basis for attributing that failure to Mrs. Braitsch.

E. Evaluation Units for 7th Communications Command:

Mrs. Braitsch had dealt with an Air Force Command in the Pentagon since 1976, and it was potentially a large customer. To interest the 7th Communications Command in a sale, Mrs. Braitsch sought to have the Command test the Symmetrix. However, 7th Communications Command's operation was so large that it required three Symmetrix's. Mrs. Braitsch included her regional manager Mr. Grilli in the process and he decided to place three systems in the command. In fact, this was a very sound decision in view of the opportunity presented. Thus, there was no basis for an allegation of poor performance against Mrs. Braitsch.

F. NSA Territory:

Mrs. Braitsch's supervisor faulted her for wanting to retain a prime customer, NSA, in her territory. The criticism is unfounded because it is based on the false claim that Mrs. Braitsch had previously agreed to give up this territory.

G. FBI Bid:

The allegation is based on the false claim that Mrs. Braitsch had failed to monitor and keep her supervisor informed about a bid to the FBI. In fact, she had "totally briefed" her supervisor concerning her efforts to make a creative sales approach to obtain the FBI business.

After she received the November 11, 1991, derogatory memo from EMC management, Mrs. Braitsch called Mike Grilli, EMC Southeast Regional Manager, to discuss the memo. Mr. Grilli told her not to do anything to get herself "in trouble.". When Mrs. Braitsch explained to

him that she was trying to obtain compensation parity with her male colleagues, Mr. Grilli responded that "EMC could pay anyone anything" it chose. To Mrs. Braitsch's claim that men and women must receive equal pay for equal work and that EMC should not violate the law, Mr. Grilli responded "watch me" (or words to that effect) and warned her that by making such complaints she risked getting herself into "trouble."

IV. Mrs. Braitsch Rejected EMC's Claim That She Was Fired for Failing to Meet Sales Quotas Because She Achieved the Highest Revenue for the Office in 1991 Sales.

Notwithstanding the manipulation of her territory and commissions, Mrs. Braitsch still was the most successful sales person in the office in 1991. Mr. Newgaard had only $39,000 in revenue in 1991.[2] Mr. Seder had about $900,000 in revenue, however, it all arose from one $800,000 sale, which had been arranged by Mr. Monkelien before he fired. Accordingly, Mr. Seder was not directly responsible for any sales. Mr. Hoover had no sales. While Mrs. Braitsch had more than $900,000 in revenue, which was still more than Mr. Seder even with the benefit of Mr. Monkelien's efforts.

Despite these facts, at the end of 1991 Mr. Newgaard got a raise. His base salary was increased to $60,000 a year and he was given an additional $2,000 a month draw which raised his total income to approximately $84,000. Mr. Hoover, who had only been with the

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[2]There is no basis for the district court's finding that Mr. Newgaard was subject to a "different [compensation] plan" because he was a first-year employee. In fact, EMC had one compensation plan that should have applied to all sales people.

company since August and had no sales was fired. Mr. Seder was retained at approximately the same circumstances in which he had been. Miss Braitsch was fired.[3]

The procedures at EMC provided for a performance improvement period prior to the initiation of an adverse personnel action. Clearly, this procedure was followed when Mr. Monkelien was fired. Later when Mr. Seder was fired, he was given a performance improvement period, but Mrs. Braitsch was not. Had she been given a performance improvement period, she would have still ranked first in the office because of sales which had been arranged as a result of her efforts for which revenue was received by EMC in 1992. In this regard, during 1992, EMC received nearly $4,000,000 in revenue as a result of her efforts as follows: Department of Transportation, $1,500,000; Air Force Logistics Command, $1,500,000; U.S. Postal Service $800,000; and Smithsonian Institute $60,000. Thus, Mrs. Braitsch would have been entitled to substantial commissions for these sales.

VI. Relevant Procedural History.

Mrs. Braitsch filed an administrative complaint and later a law suit which alleged that EMC had committed unlawful sex discrimination, harassment, and retaliation during the course of her employment and in her termination based on her observations that her employer, EMC Corporation and several of EMC's employees, were treating her unfairly by, among other things, paying her less than her male coworkers. Furthermore, when she was fired

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[3]The district court found that EMC's policy was to terminate people who did not make their goals in their second year. App. at 20a, see also 14a. However, there was no written policy or testimony upon which to base this conclusion.

within weeks of complaining about both the pay inequity and other issues, she reasonably concluded that EMC had discriminated against her on the basis of her sex and retaliated against her for complaining of such discrimination.

Mrs. Braitsch initially brought her discrimination complaint before the Fairfax County Human Rights Commission, but the Commission denied her request for relief on May 27, 1994. Then, on December 23, 1994, she filed a complaint in district court, through counsel, alleging nine counts of sex discrimination against Defendant (and the individual employee defendants) pursuant to 42 U.S.C. §§ 2000e et seq. ("Title VII"), 29 U.S.C. § 206(d) ("Equal Pay Act"), and 42 U.S.C. § 1985 ("Civil Rights Act").

The district court granted defense motions to dismiss some of the counts against EMC and its employees on February 10, 1995. Later, the district court also dismissed one of Ms. Braitsch's Equal Pay Act claims but denied the rest of EMC's motion for summary judgment on March 24, 1995. EMC filed a second motion for summary judgment on July 28, 1995. Rather than ruling on that motion, the district court allowed plaintiff's allegations of Title VII employment discrimination and Equal Pay Act violations to go to trial on July 31, 1995. At trial, defendant's motion for judgment as a matter of law was granted and plaintiff's case was dismissed by the district court at the close of plaintiff's case-in-chief on August 1, 1995. The district court ruled on the sex discrimination claims, but did not expressly address either the remaining Equal Pay Act claim or the retaliation claim in doing so.

The district court's final Order was entered on August 4. Plaintiff filed her (amended) notice of appeal of the dismissal on August 8, 1995.

Defendant EMC filed its "Petition for Interim Attorney's Fees" on November 11, 1995. The district court

exercised its discretion to deny Defendant's petition on December 12, 1995, finding that Plaintiff's case "was not frivolous, unreasonable, or without foundation." EMC did not appeal that order.

The Fourth Circuit Court, on September 12, 1996, affirmed the district court's dismissal of Plaintiff's case. Defendant then filed a second "Petition for Attorney's Fees" on November 29, 1996. The district court, on March 6, 1997, again denied the fee petition, repeating its finding that Plaintiff's case "was not frivolous, unreasonable, or without foundation."

Defendant EMC then appealed that decision raising essentially the same arguments raised in this petition but particularly suggesting that the district court may have based its denial of fees solely on the fact that defendant had been denied summary judgment. While the Fourth Circuit refused EMC's request that "guidance" be provided to the district courts requiring an award of attorney fees when a case was dismissed on summary judgment or pursuant to Rule 50, it nevertheless was compelled to remand the case to the district court to allay the concern that the district court may have based its denial of an award of attorney fees solely on the basis that plaintiff had survived summary judgment rather than a consideration of the record before it. App at 7a-9a.

On remand, Judge Hilton clearly followed the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978), which evaluates whether Ms. Braitsch pursued her case in a "frivolous unreasonable manner or without foundation," as the basis for his decision that plaintiff's claims were not frivolous and thus defendants were not entitled to attorney's fees. App. at 3a-6a. Appellant does not and cannot suggest that this is not the standard.

Additionally, Judge Hilton clearly stated his reasons for concluding that Mrs. Braitsch's case was not frivolous, unreasonable or without foundation -- that her male counterparts were paid a higher salary; that certain of her male counterparts were allowed to invade her territory without being punished; that her male counterparts received a higher car allowance; and that her manager rebuffed her when she complained of a violation of the equal pay laws. Appellant does not and cannot suggest that these findings were not supported by the record.

REASONS FOR DENYING THE WRIT

Pursuant to *Christiansburg Garment Co. v. Equal Emp. Oppt'y Comm'n*, 434 U.S. 412 (1978), the district court has discretion to award fees to a prevailing defendant in an employment discrimination case upon a finding that plaintiff's case was "frivolous, unreasonable or without foundation." There is no basis for abandoning this formulation in favor of a rule which requires that the district court award attorney's fees when a case, or a portion thereof, is dismissed on a dispositive motion.

Mrs. Braitsch brought her complaint based on facts which, under a reasonable interpretation of law, would have supported a prima facie case of sex discrimination and retaliation. The district court ultimately dismissed her claims at trial, but that court also exercised its discretion to deny the prevailing defendant's 1995 petition for attorney's fees. In its January 5, 1999 Order clarifying its denial, the district court applied *Christiansburg* and set forth cogent reasons for its finding that Mrs. Braitsch's case "was not frivolous, unreasonable or without foundation." This finding is entitled to deference and should not be set aside unless it is unsupported by the record. Moreover, the defendant has not cited any cases in which attorney's fees

were provided to the defendant without the district court's determination that those claims upon which the fees were awarded were frivolous.

The cases cited by EMC in which the court awarded attorneys' fees for some claims, despite a finding that other claims were not frivolous, are distinguishable from this case in that the court actually held that the claims in question were frivolous and the finding was supported by evidence that there was no basis in law or fact for the involved claims.

Moreover, Mrs. Braitsch's claims against the individual defendants were dismissed early in the litigation, those defendants were not parties to the Fourth Circuit appeal, and are not parties to this petition for writ of certiorari. Thus, since Title VII provides the right to the prevailing party to claim attorney's fees, EMC's petition should not be granted to the extent it bases its petition on the claims of the individual defendants.

I. This Court's Holding in *Christiansburg Garment Co. v. EEOC* Does Not Support the Interpretation that a Prevailing Defendant in an Employment Discrimination Case Must be Awarded Attorney's Fees Simply Because a Case is Decided on a Dispositive Motion.

A. Congress's Primary Intent Regarding the Award of Attorneys' Fees to a Prevailing Party is to Promote the Vigorous Enforcement of Title VII Employment Discrimination Cases

The thrust of EMC's argument in favor of an award of attorney's fees for a prevailing defendant is that the

federal court system is overwhelmed with employment discrimination cases and that "[f]ee awards to prevailing defendants [would] serve important policy goals recognized by Congress, such as deterring baseless litigation and ensuring that the fairness of the adversary process is not distorted 'by giving the plaintiff a disproportionate advantage with regard to fee entitlement.'" Pet. for Cert. at 9 (quoting *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989)). This notion is simply wrong.[4] *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (stating that assessing fees simply because a defendant prevailed on the merits would "undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII").

This Court specifically reasoned in *Christiansburg* that "at least two strong equitable considerations" exist in support of an award of attorney's fees for a prevailing plaintiff in a Title VII action, which do not exist for a prevailing defendant. *Id.* at 418. First, a plaintiff, who is usually of limited means, should be readily awarded attorney fees since she is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Id.* at 418 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). Second, when fees are awarded against a defendant it is because that party was found to have violated federal law. *See*

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[4] As a threshold matter, the promulgation of a new rule designed to deter discrimination cases is a legislative function. Therefore, EMC should take its policy arguments to its Congressperson. Moreover, EMC offers scant support for its suggestion that the district courts are being overwhelmed by discrimination cases. In this regard, data collected by the Administrative Office of the United States Courts reflect that the number of employment discrimination cases filed in 1997 decreased in 1998 so that the percentage of Title VII cases filed is stable at a range of 6.75% to 9.24% of the total civil cases filed in the district courts.

Christiansburg, 434 U.S. at 418. However, no such policy considerations are present when awarding attorney's fees to a prevailing defendant. *Id.* at 418-19. Thus, a prevailing defendant is only entitled to attorney's fees in situations where the district court has determined in its discretion that the plaintiff's action was frivolous, unreasonable, or without foundation. *See id.* at 421.

B. The Mere Fact that a Plaintiff is Aware of the Facts or Legal Principles Which Later Form the Basis for Dismissal on a Dispositive Motion Does Not Compel the Conclusion that Her Claims Were Frivolous, Unreasonable, or Meritless.

It is undisputed that a prevailing defendant should be entitled to attorney's fees for defending itself against a frivolous, unreasonable, or meritless claim. *See id.* at 421. However, this Court has held that "the term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case." *Christiansburg,* 434 U.S.. at 421. Moreover, this Court has made clear that district courts should not engage in "post hoc reasoning" when considering whether attorney's fees are appropriate because occurrences during the course of litigation, may make a suit that was reasonable at its outset appear groundless in retrospect. *Id.* at 421-22. Thus, the standard to be applied when making the determination whether a prevailing defendant is entitled to attorney's fees is not, as suggested by the petitioner, whether "throughout the *entire* course of litigation the plaintiff was justifiably unaware of the facts or legal principles that ultimately resulted in dismissal." Pet. for Writ of Cert. at 10. This approach would involve the very

post-hoc reasoning which the *Christiansburg* Court warned against.

EMC argues that attorney's fees should be awarded against Mrs. Braitsch, because she knew or should have known that her claims would be rejected as a matter of law before she even filed her lawsuit. *See* Pet. for Writ of Cert. at 11. However, this Court specifically stated in *Christiansburg* that

> [t]his kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

Id. at 422. Thus, EMC's argument that Ms. Braitsch's §1985(3) conspiracy claims and her Title VII claims against her supervisors in their individual capacities were frivolous not does warrant a finding pursuant to *Christiansburg* that the defendant is entitled to attorneys' fees for prevailing on these claims. Clearly, the law in the Fourth Circuit has changed on numerous occasions since Ms. Braitsch filed her suit and thus she was justified in filing all plausible claims. Moreover, it is clear that in light of discovery Ms. Braitsch may have uncovered facts likely to support her claims. Similarly, EMC's argument that because Ms. Braitsch failed

to survive a motion as a matter of law at the close of her case in chief based on the trial judge's determination that she had not sustained her burden to establish a prima facie case is irrelevant in the determination regarding attorneys' fees.

Clearly, Ms. Braitsch was reasonable in believing that she had been discriminated against and taking action to have her claims adjudicated. Moreover, it is extremely plausible that during the course of discovery her attorney would have discovered evidence to make out a prima facie case. To say that since she ultimately failed to do so is to partake of the very post hoc reasoning that this court warned against doing and would result in deterring Title VII litigation in its entirety except for the rare case involving a smoking gun.

This Court explained the difference between a lawsuit that is deemed "meritless" and one that is objectively "frivolous" and "groundless or without foundation" in *Hughes v. Rowe*, 449 U.S. 5 (1980). In *Hughes*, the district court had dismissed the plaintiff's civil rights action, deemed it "meritless," and awarded attorney's fees to the prevailing defendants. *Id.* at 5. The Seventh Circuit affirmed, but this Court vacated the award. *Id.* at 5-6.

Even though the plaintiff's complaint was dismissed for failure to state a claim (and deemed "meritless"), this Court found that plaintiff's allegations were "definitely not 'meritless' in the *Christiansburg* sense." *Id.* at 16. The plaintiff's civil rights allegations were meritorious enough to require judicial scrutiny and evaluation. "Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District court and the Court of Appeals." *Id.* at 15-16.

Mrs. Braitsch's complaint did not ultimately prevail, but it required full briefing of issues raised by motions and a partial trial before all of the causes of action were dismissed. As in *Hughes*, neither the district court nor the Fourth Circuit ever found Mrs. Braitsch's claims frivolous or groundless. *See Hughes*, 449 U.S. at 15 (no "finding" supported the fee award). At each stage of this litigation, Mrs. Braitsch's claims were reasonably supported by evidence and law. *Hughes'* ruling applies here: "Allegations that upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless,' or 'without foundation' as required by *Christiansburg*." *Id.* at 15-16.

The Court in *Equal Employment Oppt'y Comm. v. Reichhold Chemicals,* 988 F.2d 1573 (11th Cir. 1993) arrived at the *Hughes'* conclusion when applying *Christiansburg* in an analogous employment case. In *Reichhold Chemicals*, the EEOC filed a complaint that alleged employment discrimination and retaliation under Title VII and the EPA. *Id.* at 1565-66. The female complainant, a corporate staff accountant, had been receiving raises and favorable performance evaluations for several years. She found, however, that she was earning less than a similarly-trained male accountant although she had more responsibility. *Id.* at 1566-67. At one point, both she and the male accountant performed the same jobs, but the male received higher pay. *Id.* at 1567. When she filed an EEOC complaint challenging the disparate pay, her supervisors downgraded her performance evaluations and rejected her applications for internally-advertised positions. *Id.* at 1567-68.

At the close of plaintiff's case, the *Reichhold Chemicals* district court granted defendant employer's motion to dismiss and awarded defendant's attorney's fees. On appeal of the attorney's fee award, the Eleventh Circuit

observed that the defendant had presented "convincing proof of non- discriminatory reasons" and had "defeated her claims on the merits." Nevertheless, without disturbing the district court's ruling on the merits, the Eleventh Circuit reversed the attorney's fees award because "the cumulative effect" and timing of the employer's actions were sufficient to "meet the plaintiff's initial burden." *Id.* at 1572.

The *Reichhold Chemicals* reasoning, which expressly follows *Christiansburg*, undermines EMC's position in this petition. EMC argues that because EMC provided substantial evidence to rebut Mrs. Braitsch's employment discrimination claims, Mrs. Braitsch's case then became frivolous. *Reichhold Chemicals* shows that even "convincing proof" of nondiscrimination, enough to warrant dismissal of the claim, is not sufficient ground to justify finding plaintiff's claim frivolous under *Christiansburg*.

Truly "frivolous" cases are those where plaintiffs "did not introduce any evidence to support their claims." *Sullivan v. School Bd. Of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir. 1985) (collecting cases). The courts have held cases to be "frivolous" when there is an aggravating factor. For example, the Fourth Circuit found a plaintiff's civil rights action "frivolous" because (1) there was no basis in fact, (2) the evidence at trial was no more than "conjecture and speculation," and (3) the plaintiffs had a clear motive of revenge. *Hutchinson v. Staton*, 994 F.2d 1076, 1080 (4th Cir. 1993). In *Arnold v. Burger King Corp.* 719 F.2d 63, 66 (4th Cir. 1983), the plaintiff's case not only lacked evidence of discrimination, but the plaintiff had been fired because he sexually harassed female co-workers. In *Turner v. Sungard Business Systems, Inc.*, 91 F.3d 1418 (11th Cir. 1996), the prevailing defendant received attorney's fees because plaintiff's first attorney withdrew from plaintiff's case saying it was groundless, and plaintiff (and counsel) filed no opposition to defendant's

motion for summary judgment because the case was so groundless. *Id.* at 1420, 1423.

By contrast, in *Sullivan*, *supra*, the Court held that plaintiff's employment and civil rights action was not so devoid of factual support as to be frivolous, even though "a clear preponderance of the evidence" favored the defendant. *Sullivan*, 773 F.2d at 1188.

The evidence may not have been sufficient to prove employment discrimination to a jury, but Mrs. Braitsch did provide facts and reasonable inferences to show that EMC was treating her unfairly, and quite plausibly it was because of her sex. The District court observed, even when justifying the dismissal under Rule 50 at trial, that "it may be that this plaintiff and Mr. Monkelien both were treated unfairly, in quotes, in that they were the first sales people that came on." App. at 19a. Later, the judge told the jury that subsequent salesmen made more money than Mrs. Braitsch and Mr. Monkelien, and "that may not be fair in the whole scheme of things, I don't know ..." App. at 21a.

The evidence suggested palpable unfairness in her situation, even to the judge who ruled against Mrs. Braitsch. Although she did not prevail ultimately, her claims were not frivolous.

II. The Basis on Which a Court May Award Attorney's Fees to a Prevailing Defendant Is Clearly Articulated in *Christiansburg* and There Is No Controversy in the Circuits Regarding this Formulation.

There are several reasons why EMC's claims that this case provides a proper vehicle for addressing a conflict in the circuits on should be rejected. First, there is no such conflict. Under *Christiansburg*, the issue of attorney's fees

is committed to the discretion of the district court and a prevailing defendant is entitled to an award of attorney fees upon a finding that plaintiff's claims were "frivolous, unreasonable, or without foundation." 434 U.S. at 421. This Court's holding in *Christiansburg* does not leave room for dispute in the circuits upon this point and EMC has not cited a single case in any circuit where the Court of Appeals has held otherwise. With respect to Mrs. Braitsch's claims, the district court found that because -- her male counterparts were paid a higher salary; that certain of her male counterparts were allowed to invade her territory without being punished; that her male counterparts received a higher car allowance; and that her manager rebuffed her when she complained of a violation of the equal pay laws Mrs. Braitsch's claims were "not frivolous, unreasonable, or without foundation." App. at 5a. Because EMC could provide no basis for concluding that the district court's findings were not supported by substantial evidence, the Fourth Circuit granted summary affirmance under Fourth Circuit Local Rule 27(f) and dismissed EMC's appeal. See App. at 1a-2a. EMC has not cited a single case in any circuit where the Court of Appeals has found that a prevailing defendant should be awarded fees, notwithstanding a determination by a district court, based upon record evidence that plaintiff's action was "not frivolous, unreasonable, or without foundation."

The cases cited by EMC do not support its claim that there is a split in the circuit regarding the circumstances under which a prevailing defendant should be awarded attorney's fees. The petitioner has not cited a Fourth Circuit opinion in which the court failed to award attorney's fees even though the district court had found in its discretion that the plaintiff's claims were frivolous nor did the defendant argue that there was a split in the circuits while the issue was before the Fourth Circuit. Moreover, in each

of the cases cited by the petitioner the district court specifically made a finding that the claim on which attorney's fees were awarded was frivolous based on the finding that the plaintiffs had failed to even allege the crucial elements of the frivolous counts. For instance the petitioner cited *Curry v. A.H. Robbins Co.*, 775 F.2d 212 (7th Cir. 1985), to support the proposition that "a prevailing defendant may be awarded fees incurred in defending against a frivolous claim or portion thereof, even if other claims asserted by the plaintiff were not frivolous." Pet. for Writ of Cert. at 15. However, the facts of *Curry* are clearly distinguishable from the situation involving Mrs. Braitsch's claims. In *Curry*, the plaintiff sued on various grounds resulting from physical and emotional injuries caused by a defective Dalcon Shield intrauterine device. *See id.* at 214. In addition to counts involving fraudulent misrepresentation and strict liability for her injuries, which were ultimately determined to be barred by the statute of limitations, Count III of her complaint was dismissed pursuant to an unopposed motion to dismiss. Count III alleged that the defendant's actions deprived the plaintiff of certain rights, including those provided by the Ninth and Fourteenth Amendments of the United States Constitution, based on the allegation that the defendant knowingly sold unsterilized Dalcon Shields to the United States Agency for International Development ("AID") which would ultimately create a health hazard for future users. *See id.* at 214. However, the plaintiff alleged that Count III was in violation of 42 U.S.C. § 1983 and never suggested that the claim should be brought under the Constitution or any other statute or treaty of the United States until after the petition for attorney's fees was made by the defendant. *See id.*

In its decision upholding the award of attorney's fees against the plaintiff for Count III of her complaint, the Seventh Circuit specifically stated that the district court had

not abused its discretion in finding that the claim "was based on a violation of 42 U.S.C. § 1983 and that Curry failed to allege any conduct on the part of the defendants even arguably under color of state law as required by 42 U.S.C. § 1983" and thus was entirely without foundation. *See id.* at 219-20. Moreover, the Court of Appeals found that the plaintiff "apparently included a § 1983 claim in her complaint at least in part, in an attempt to claim attorney's fees under § 1988." *Id.* at 220 (mentioning that the plaintiff never even responded to the motion to dismiss). Thus, there can be no question that Count III was frivolous, unreasonable, or without foundation.

Similarly, in *Andrade v. Jamestown Housing Authority*, 82 F.3d 1179 (1st Cir. 1996), the Court of Appeals affirmed the district court's determination that the counts on which attorney's fees were awarded were frivolous. The plaintiff in *Andrade* failed to allege in her complaint "that her discharge was based on 'some racial or otherwise class-based invidiously discriminatory animus,'" in addition to conceding that the claim was facially defective. *Id.* at 1192 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). Thus, there is no dispute that the claim was frivolous based on the failure to even allege the crucial elements of the claim. Moreover, in the same opinion the Court of Appeals noted its disagreement with the district court's finding that the plaintiff's intentional infliction of emotional distress claim was frivolous when brought. *See id.* at n.9. Clearly, the First Circuit follows the *Christiansburg* approach in which a claim is not frivolous simply because the plaintiff did not survive judgment as a matter of law. Furthermore, claims may be brought which may even "appear questionable or unfavorable at the outset" without warranting a finding of frivolousness. *Christiansburg*, 434 U.S. at 422.

In *Head v. Medford*, 62 F.3d 351 (11th Cir. 1995). the Court of Appeals noted that the plaintiff was an at-will employee and thus "had no cognizable federal constitutional right to due process or a claim for a taking." *Id.* at 356. Thus, her claim was frivolous and groundless. *See id.* at 356. In *Popham v. City of Kennesaw*, 820 F.2d 1570 (11th Cir. 1987), the Court of Appeals found that the district court had not abused its discretion in finding that the claims brought under the First Amendment against individual defendants were not frivolous and thus were not entitled to attorney's fees, although it remanded to the district court to determine whether the claims against the city defendant were frivolous. *See id.* at 1582-83.

Thus, in all the cases cited by the petitioner, a specific finding was made that the relevant claims were frivolous before any award of attorney's fees was made to the prevailing defendant. Moreover, in those cases where fees were warranted it was as a result of the plaintiff's failure to even satisfy the crucial elements of her claim so that upon any set of facts or any interpretation of the law the plaintiff could not possibly satisfy her burden. *See Andrade*, 82 F.3d at 1192 (stating that the plaintiff failed to allege that her termination was a result of racial animus as well as failing to allege that she belonged to a particular class of which the defining criteria were invidious); *Curry*, 775 F.2d at 219-220 (failing to allege any state action as required by 42 U.S.C. § 1983). Additionally, in several instances the court found that the allegation of a civil rights violation was brought merely to secure the ability to pursue attorney's fees upon a successful outcome. *See Curry*, 82 F.3d at 220 (stating that plaintiff apparently included the claim so as to attempt to collect fees).

The Fourth Circuit's refusal to award fees based upon EMC's argument that Ms. Braitsch was frivolous because some of the claims filed on her behalf were

dismissed in an early motion is understandable since the decision as to which legal theories should be pleaded is one that was made by her attorneys. *See Shea v. Donohoe Const. Co., Inc.*, 795 F.2d 1071, 1077-78 (D.C. Cir. 1986) (Courts disfavor sanctioning a party for counsel's misconduct unless the party itself is somehow implicated); *see, e.g., In re Ruben*, 825 F.2d 977, 986 (6th Cir.1987), *cert. denied,* 485 U.S. 934, 108 S.Ct. 1108, 99 L.Ed.2d 269 (1988); *see also* Joseph, SANCTIONS § 27(A) at 436 ("a party cannot be taxed with the misconduct of his or her counsel absent evidence reflecting that the party participated in the misconduct"); *Gundacker v. Unisys Corp.*, 151 F.3d 842, 849 (8th Cir. 1998) (refusing to impute liability to client "because his attorney decided to 'run wild'"). In this regard, Mrs. Braitsch's attorneys deemed the claims against the individuals and the conspiracy claims to be valid claims, and filed oppositions and raised colorable defenses to the dispositive motions.

Moreover, if EMC believed that the attorneys had improperly advanced these claims, EMC or the individual defendants could have raised claims against Mrs. Braitsch's attorneys under Fed. R. Civ. Proc. Rule 11. However, they elected not to do so. In view of EMC's decision not to seek relief against Mrs. Braitsch's former attorneys, EMC should not be permitted to hold Mrs. Braitsch responsible long after those attorneys have departed from her case. Compare *Kaplan v. Zenner*, 956 F.2d 149, 151 (7th Cir.1992) (requests for sanctions must be filed "as soon as practicable after discovery of a Rule 11 violation").

EMC's approach now puts Ms. Braitsch in the position of justifying the actions of attorneys whom she discharged in June 1995, several months after the actions upon which EMC now bases its claims took place. However, in their defense, Title VII law, especially in the Fourth Circuit is in state of flux. In this regard, since Ms.

Braitsch's lawsuit was filed, Fourth Circuit approaches have been overruled by this Court on at least three occasions. *See Reeves v. Sanderson Plumbing Products, Inc.*, ___U.S. , 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)(reversing *Theard v. Glaxo*, Inc., 47 F.3d 676 (4th Cir. 1995)) which articulated Fourth Circuit pretext-plus interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407(1993); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (overruling *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261-62 (4th Cir.1996)) which had applied the Fourth Circuit's negligence standard as the sole basis for imposing liability upon employers for abusive or hostile workplace discrimination; and *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (*reversing Robinson v. Shell Oil Co.*, 70 F.3d 325(4th Cir. 1995)) where the Fourth Circuit had ruled that term "employees," as used in antiretaliation provision of Title did not apply to former employees.

Ms. Braitsch's law suit was filed years before *Ellerth* and *Faragher*, in which this Court clarified circumstances under which an employer was vicariously liable when it claims that sexual harassment by its managers violated company policy. Prior to that the Fourth Circuit had held that in a sexual harassment case the acts of a manager were ultra vires and, absent notice to top management, there was no basis for holding the employer liable. *See Andrade v. Mayfair Management*, Inc., 88 F.3d 258, 261-62 (4th Cir.1996)(illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment). Had the Fourth Circuit extended this principle to acts of discrimination, plaintiff's conspiracy claims and claims against the individual might have been her

only recourse. Thus, while those claims may have appeared "questionable or unfavorable at the outset," they were not necessarily frivolous given the constantly changing case law in this field.

Further, EMC has no standing to make a claim for attorney fees incurred on behalf of individual defendants who are not a party to this appeal. It is well established that only the prevailing party has standing to seek attorney fees under Title VII or § 1988. *See Soliman v. Ebasco Servs., Inc.*, 822 F.2d 320, 323 (2nd Cir. 1987) *cert. denied,* 484 U.S. 1020 (1988); *Keese v. Orr*, 816 F.2d 545, 546-47 (10th Cir. 1987); *Rainsbarger v. Columbia Glass & Window Co.*, 600 F. Supp 299 301- 02 (W.D. Mo. 1984). Mrs. Braitsch's claims against the individual defendants were dismissed early in the litigation. Her appeal did not even address the claims which had been made against the individual defendants. A motion for attorney fees was never submitted on behalf of these individuals. Accordingly, they are not parties to this petition. To the extent that EMC bases its petition on the claims of the individual defendants who are not parties to this appeal, those arguments should be rejected.

Finally, when Congress enacted Title VII, it made clear that an employee should be free to bring a complaint of discrimination without fear of retaliation. *See* 42 U.S.C. §2000e-3. This applies even if it the underlying discriminatory conduct is not proven. *Little v. United Tech.*, 103 F.3d 956, 960 (11th Cir.1997); *see also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981) ("To effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise, we are compelled to conclude that a plaintiff can establish a prima facie case of retaliatory discharge under the opposition clause of [Title VII] if he shows that he had a reasonable belief that the employer was engaged in unlawful

employment practices."), *cert. denied,* 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). Really, EMC's current claims are nothing more than a mode of retaliation. Certainly, EMC has spent far more in pursuit of its claims against Ms. Braitsch than it truly could hope to recover. The claims against the individuals and the conspiracy claims were dismissed in early motions and the expenses for those motions could not have been very high. In pursuing its current claim for attorney fees, EMC has gone through three law firms, three denials by the district court, two appeals, a petition for rehearing en banc and now this petition. Since EMC cannot have an economic purpose for its obstinate pursuit of Ms. Braitsch, its only reason for doing so would have to be to punish her for suing. To grant the petition in this case would be to encourage EMC's spitefulness.

CONCLUSION

The petition for writ of certiorari should be denied.

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